Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

CONNIE LYNN MADRAY and
MELODY HOLDEN,

Petitioners,

vs.

PUBLIX SUPERMARKETS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. May an employer limit to specific individuals those persons to whom a victim of hostile-environment employment discrimination must complain internally as a condition precedent to maintaining an action for harassment?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment through actual notice to an intermediate supervisor who reports it no further?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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harassment, one which should be, but has not been, decided by this Court, i.e., whether the actual knowledge of an employer's "agent" who is not part of "higher management" constitutes notice to the employer? 14

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No.

In The

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CONNIE LYNN MADRAY and
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Connie Lynn Madray and Melody Holden, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 1290 (11th Cir. 2000) and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the district court is reported at 30 F.Supp.2d 1371 (S.D. Fla. 1998) and is reproduced at 26a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on April 13, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Plaintiffs brought this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, basing federal jurisdiction on 42 U.S.C. 2000e-5(f)(3) and 28 U.S.C. § 1331 (federal question) and 1343(3) (civil rights cases).

I. Facts[1]

In a series of acts that both the district court and the court of appeal assumed constituted actionable sexual harassment, Ronald Selph, the manager of the Publix Supermarket in Okeechobee, Florida, for several months in 1995 regularly hugged Connie Lynne Madray closely from the front, rubbed up against her, kissed her on the cheeks, blew into her ear and made unwelcome sexual remarks. He behaved similarly to her sister, Melody Holden. Selph also attempted to spank another employee, Maria Chesser, on her birthday and hugged Darlene Clark and Lilsa Fralix, two subordinate managers.

---

[1] The facts are essentially drawn from the Statement of Facts in Support of Plaintiffs' Responses to Motions for Summary Judgment, Docket Entry 80.

Selph in August 1995 walked into the office where Holden and David Neff, the bakery manager, were speaking, brushed Holden's hair away and leaned his face toward's Holden's neck. Neff exclaimed "[t]hat's sexual harassment," to which Selph replied, "I don't care what you call it." Another subordinate manager, Gary Priest, witnessed Holden rubbing Holden's back as she appeared to be leaning away from Selph. When Priest attempted to ask a question, Selph responded that Priest should not interrupt Selph when Selph was "hugging or touching a beautiful woman."

Madray and Holden both complained separately to Clark at a party that Madray did not like the way in which Selph touched her and that Selph's behavior made Holden sick. Clark commiserated that Selph had done the same things to her. About a month later, Holden told Priest at another social occasion about Selph's grabbing her and, as if ballroom dancing, dipping her and kissing her neck. Neither Madray nor Holden asked those managers to take their complaints higher; neither, however, asked that they be kept confidential. Neither Clark nor Priest initiated any report to anyone higher in the company.

Finally, however, Neff, after observing Selph attempt to kiss Holden on the neck, told Holden that if Selph's behavior continued and Holden did not complain about it, it would be Neff's duty as a manager to do so. So, shortly thereafter, Holden and Madray in August 1995 asked manager Priest to contact district manager Richard Rhoads, who arranged to meet the two women outside the store August 23.

During the meeting, Rhodes expressed upset that none of the managers had told him about Chasser's

complaints concerning the attempted spanking. Rhodes immediately began an investigation, during which Selph admitted his behavior, saying that he was acting as he did in an attempt to make the women (and other) employees feel as if they were one, big, happy, productive family. Rhoads' investigation did not find Selph to be guilty of sexual harassment, but rather found only that he had acted unprofessionally and had violated Publix' Rules of Unacceptable Conduct. Publix demoted Selph to an assistant manager and transferred him to another store in another town.

Selph's conduct violated Publix' sexual harassment policy, which explicitly forbade, *inter alia*, "patting, pinching, brushing up against, hugging, cornering, kissing, fondling, or any other similar contact." That policy directs anyone who feels the victim of such behavior to "bring this to the attention of appropriate persons in company management," enumerating those "appropriate" persons as the store manager, district manager, any one of several divisional personnel managers and the employee assistance program coordinator. The immediately preceding section in the employee handbook, the "Open Door Policy," states that "[i]f something bothers you,... please talk to a manager about it...." The Open Door Policy suggests that an employee should "[d]iscuss your problem or raise your question directly with your immediate Supervisor/Manager/Department Head" and continue up the chain to a vice-president if the issue is not resolved.

II. Procedural background

In 1996, Madray and Holden sued Publix and Selph. Each sued Publix for sexual harassment/hostile work environment under Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e, *et seq.* (Count I/Madray and Count II/Holden). Each also sued Publix and Selph for battery (Counts III and IV), intentional infliction of emotional distress (Counts V and VI), invasion of privacy (Counts VII and VIII), and violation of the Florida Civil Rights Act of 1992, FLA. STAT. ch. 760, 1995 Florida Laws 92-177. They based jurisdiction over the state law claims on the district court's supplemental jurisdiction under 28 U.S.C. § 1367.

The district court granted summary judgment against both plaintiffs on their Title VII claims and declined to exercise supplemental jurisdiction over any of the state-law claims, dismissing them without prejudice. In granting summary judgment, the district court held that, under the affirmative defenses established in *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), plaintiffs had "unreasonably failed to take advantage of preventative or corrective opportunities provided by Publix." *Madray v. Publix Supermarkets, Inc.,* 30 F.Supp.2d 1371, 1376 (S.D. Fla. 1998); App. at 35a. The district court held that allowing sexual harassment victims to complain to anyone outside those persons whom the employer designates as its complaint recipients "would require an employer to be automatically liable for harassment committed by a supervisor." *Id.*

A panel of the United States Court of Appeals for the Eleventh Circuit affirmed, *Madray v. Publix Supermarkets, Inc.,* 208 F.3d 1290 (11th Cir. 2000), holding that

> [P]ublix cannot be charged with notice of the harassment via the plaintiffs' earlier, informal complaints to mid-level managers within their

> store who were not designated to receive complaints of sexual harassment under Publix's anti-harassment policy.

208 F.3d at 1302; App. at 25a.

The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final decision.

REASONS FOR GRANTING THE WRIT.

I.

The United States Court of Appeals for the Eleventh Circuit has entered a decision that conflicts with the decisions of at least two other courts of appeals concerning whether an employer may prescribe a precise and exclusive method of invoking its policy against hostile environment sexual harassment.

The Court should grant the petition for a writ of certiorari to establish uniformity amongst the circuits in the application of the affirmative defense that it established two years ago in *Faragher v. The City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

The circuits now conflict. Division exists between

the Eleventh[2] Circuit on one side, and the Third[3] and Fifth[4] Circuits on the other.

The court below held that, as it interprets the *Faragher* affirmative defense,[5] Publix was within its rights to limit the avenues for complaining about harassing behavior by a supervisor to "appropriate persons in Company Management," whom it listed as including only "the Store Manager, District Manager, or Divisional Personnel Managers," 208 F.3d at 1300; App. at 6a, 18a-19a, and not to be bound by notice to the subordinate managers of Store 118 because "once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances." *Id.* at 1300; App. at 19a. (citation, internal quotation marks omitted). Thus, "Publix cannot be considered to have been placed on notice of Selph's harassing behavior by the plaintiffs'

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[2] *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000).

[3] *Hurley v. Atlantic City Police Department*, 174 F.3d 95 (3rd Cir. 1999).

[4] *Williamson v. City of Houston*, 148 F.2d 462 (5th Cir. 1998).

[5] The employer must satisfy two elements to successfully interpose this defense, proving "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *see also Ellerth*, 524 U.S. at 765.

informal complaints to individuals not designated by Publix to receive or process sexual harassment complaints." *Id. Compare Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999) ("[S]undor's own promulgated sexual harassment policy clearly specified the steps a victimized employee should take to alert the employer of harassment. Specifically, the policy directs that '[a]ny employee who feels he or she is being sexually harassed should immediately contact their line manager, Personnel Contact, *or other manager with whom they feel comfortable*'") (emphasis added).

The Eleventh Circuit's approach elevates form over substance and ignores the many ways that an employer can become aware that there is bad behavior afoot. The Eleventh Circuit's approach focuses too narrowly on an employer's vicarious liability for a first-level-or-higher supervisor's harassing behavior, regardless of its knowledge of that behavior, pursuant to the principles set out at RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).[6]

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[6] RESTATEMENT (SECOND) OF AGENCY §219 provides as follows:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or

(continued...)

The Eleventh Circuit's approach allows the mere existence of a reasonable sexual harassment policy to trump both constructive and actual knowledge of that harassing behavior — which would be negligence, as dealt with in RESTATEMENT (SECOND) OF AGENCY, § 219(2)(b). The Eleventh Circuit's approach contravenes *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), which specifically rejected the notion "that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability." *Id.* at 72. Indeed, as long as a company has an on-paper policy, any victim of hostile-environment discrimination who did not follow it absolutely could be worse off under *Madray* than she would have been before the Court decided *Faragher,* even though the employer had (as here) actual or constructive notice of the harassment through other management personnel. Surely that was not the Court's intent in *Faragher*.

As the court of appeals for the Fifth Circuit noted in *Williamson v. City of Houston*, 148 F.2d 462 (5th Cir. 1998), a case in which the City attempted to argue that it was not on notice of an offending co-worker's behavior until the plaintiff filed an internal affairs complaint, even though she had been complaining all along to their sergeant:

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[6](...continued)

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

> [T]he question before us is whether Bozeman's knowledge of McLeod's harassment of Williamson should be imputed to the City for purposes of holding that it knew or should have known of the harassment and therefore can be held liable for negligently failing to take prompt remedial action. Although, as noted, this area of law has not yet been fully developed, we believe the facts here present a situation in which liability is clearly appropriate.

148 F.3d at 466.

While the *Madray* panel faulted Madray and Holden for not pursuing the Open Door Policy to levels of management beyond Clark and Priest, the Fifth Circuit in *Williamson* rejected a similar argument, holding that "[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law." *Id.* at 467.

Likewise, in *Hurley v. Atlantic City Police Department*, 174 F.3d 95 (3rd Cir. 1999), the Third Circuit eschewed requiring a plaintiff to follow any particular path to complain about sexual harassment. Citing to *Williamson* after listing the various approaches that Atlantic City wished to impose on Hurley, the *Hurley* court noted that she "had no obligation to try all these mechanisms, because her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to the ACPD's own policy, was on notice of the harassment." This is in sharp contrast to the Eleventh Circuit's permitting an employer to develop a precise procedure by which someone must complain about hostile-environment discrimination if she is going to have

any protection from it whatsoever.

The Eleventh Circuit's position in this case contravenes not only that taken by the Fifth and Third Circuits, but also congressional intent and this Court's allowance in *Faragher* for a hostile-environmental discrimination victim either to resort to the employer's mechanism for preventing discrimination or to "avoid harm otherwise." 524 U.S. at 778. In drafting the Civil Rights Act of 1991, Congress considered and rejected a proposal that would have required harassment victims to pursue internal complaint procedures such as the one the Eleventh Circuit approves in *Madray*.[7] This Court, in *Faragher*, overruled the Eleventh Circuit's insistence that higher management have actual or constructive knowledge of hostile-environment discrimination before an employer could be held liable but provided employers with an affirmative defense to avoid the strict liability that

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[7] In favorably reporting out what would become the Civil Rights Act of 1991, the House Committee on Education and Labor said concerning its rejection of a Republican proposal to impose an internal reporting requirement:

> [F]or the first time under Title VII, the availability of a remedy would be conditioned on a victim filing a complaint with his or her employer in addition to filing a complaint with a neutral, administrative enforcement agency. If a harassment victim failed to comply with every technicality of an employer's complaint procedure, the Republican substitute provided that "no unlawful employment practice shall be found to have occurred." That rule would apply even if a court finds undisputed evidence or egregious harassment and concludes that using the employer's complaint procedure would have been completely futile....

H.R. REP. No. 102-40(I), pt. 1, at 103 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 641.

would otherwise attach. That two-pronged defense, however, requires nowhere near the mechanistic compliance as does the Eleventh Circuit's position in *Madray*. While the Court stated that a discrimination victim's unreasonable failure to use the employer's complaint procedure would "normally suffice to satisfy the employer's burden under the second element of the defense," it did not draw the bright line that the Eleventh Circuit has set forth in the case at bar. *Compare Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1998) ("Watts' filing of a union grievance comports with the *Burlington/Faragher* rubric ... to take corrective opportunities provided by the employer 'or to avoid harm otherwise'"). *See also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Compliance Manual (BNA) No. 4075, § V(D)(2) (Other Efforts to Avoid Harm) (June 18, 1999) ("Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm.") The Eleventh Circuit's approach, unlike that of the Third and Fifth Circuits, recasts the second prong of the affirmative defense from an issue of mitigation[8] into nothing less than a condition precedent for maintaining a hostile-environment action pursuant to Title VII.

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[8] *See Faragher*, 524 U.S. 806, *quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982) ("a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute").

II.

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law concerning hostile-environment sexual harassment, one that should be, but has not been, decided by this Court, i.e., whether the actual knowledge of an employer's "agent" who is not part of "higher management" constitutes notice to the employer?

The Court should grant the Petition for a Writ of Certiorari and should decide whether knowledge of lower level managers of hostile-environment discrimination constitutes notice to the employer.

While the Court in *Faragher* granted certiorari on the question of whether a fact-finder may infer notice to an employer of hostile-environment sexual harassment through notice to an intermediate supervisor who reports it no further, it expressly did not reach that issue because its decision made it unnecessary to do so. *See Faragher*, 524 U.S. at 810,[9] Petition for Certiorari, Questions

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[9] The Court stated:

> The Court of Appeals also rejected the possibility that it could hold the City liable for the reason that it knew of the harassment vicariously through the knowledge of its supervisors. We have no occasion to consider whether this was error, however. We are satisfied that liability on the ground of vicarious knowledge could not be determined without further factfinding on remand, whereas the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable (as would be any consideration of negligence as an alternative to a theory of vicarious liability (continued...)

Presented for Review, II.C.

That left intact the Eleventh Circuit's position – which the case at bar reinvigorates – that only complaints to "higher management" are sufficient to trigger liability for hostile-environment sexual harassment. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir. 1997) (en banc), *rev'd on other grounds*, 525 U.S. 775 (1998).[10] *See also Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 866-867 (11th Cir. 1997), *cert. granted, judgment vacated*, 524 U.S. 947 (1998) ("The employee can show that the employer knew of or should have known of harassment by proving either that she complained to higher management of the problem or that the harassment was so pervasive as to infer

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[9](...continued)
here).

524 U.S. at 810.

[10] Rejecting the notion that the women lifeguards' complaints to another lifeguard captain, Robert Gordon, were sufficient to put the City on notice, the *en banc* Eleventh Circuit majority stated:

> An employer is directly liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt remedial action. A plaintiff can prove an employer's knowledge of harassment by showing she complained to higher management.... The district court found that Faragher did not complain to higher management at the City. While several lifeguards complained to lieutenant Gordon, the district court found that he did not rank as higher management in the City and, therefore, that notice to him should not be imputed to the City.

Id. (Citations omitted.)

constructive knowledge on the part of higher management"); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988) (same); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752 (11th Cir. 1997) (Pizza Hut waitresses' complaints to restaurant manager about delivery driver's sexual harassment insufficient to put "higher management" on notice). *Compare Sims v. Health Midwest Physician Services Corp.*, 196 F.3d 915, 920 (8th Cir. 1999) ("Notification of sexual harassment to an employer need not come solely from the victim of the harassment for knowledge to be imputed to the employer.")

The Eleventh Circuit's approach of refusing to impute to a corporation the knowledge of its lower management is alien to the agency principles to which the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) commended the lower courts in assessing employer liability for hostile-environment sexual harassment. Under the RESTATEMENT (SECOND) OF AGENCY § 272 (1958), an employer is charged with knowledge of information known to an employee who has a duty to report that information to other officials. Although the subordinate store manager's duty to report complaints of sexual harassment up the line may not be as explicit from Publix' policy statement as the duty of the Houston police sergeant in *Williamson*, *see* 148 F.3d at 466 ("the City is hard pressed to explain why Bozeman's knowledge of harassment should not be imputed to the City when its own policy placed an affirmative duty on him to pass such information up the chain of command") or the captain in *Hurley*, *see* 174 F.3d at 118 ("her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to the ACPD's own policy, was on notice of the harassment"), the following give rise to an inference that the assistant managers had a duty to relay

complaints in general up the line to higher management: (1) district manager Rhoads' discomfit at not having been told by the subordinate manager's about the spanking complaint; (2) manager Neff's comment to Holden that if Selph's behavior continued and she did not complain, Neff would have to do so; and (3) the instructions in the Open Door Policy to go to one's immediate supervisor with any problem.

The Seventh Circuit, in the pre-*Faragher* case of *Young v. Bayer Corp.*, 123 F. 3d 672 (7th Cir. 1997), focused on "an important question: what is the lowest level in a corporate or other institutional hierarchy at which notice to an employee of sexual harassment is deemed notice to the employer?" *Id.* at 672-673. The *Young* court suggested, sensibly, that the twin inquiries should be, "who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it." 123 F.3d at 675.

The inquiry prescribed in *Young* comports with the traditional agency principles to which the Court said in *Meritor* that courts should look for guidance. The stone wall that the Eleventh Circuit builds around subordinate manager's knowledge of Selph's misbehavior does not.

(The court of appeals' dismissed Madray and Holden's complaints to the subordinate managers as not constituting notice to the company in part because they were made "during informal, often social, circumstances." 208 F.3d at 1302. This, however, ignores the principle that "[e]xcept for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agency is immaterial in determining

the liability of his principal because of it,"[11] and "[s]ince the mind of the agent cannot be divided into compartments, the principal should be bound by whatever knowledge the agent has, irrespective of its source or time of acquisition..."[12])

In summary, the Eleventh Circuit panel's decision has raised once again an important question about federal law and has answered that question once again adversely to sexual-harassment plaintiffs. This issue of notice, which goes to the very heart of enforcement of federal laws proscribing work-place sexual harassment, should be resolved by this Court. Thus, the Court should issue the writ.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[11] RESTATEMENT, § 276 (1958).

[12] RESTATEMENT, § 276, cmt. a (1958).

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 13, 2000

United States Court of Appeals,

Eleventh Circuit.

No. 98-5802.

Connie Lynn MADRAY and Melody Holden, Plaintiffs-Appellants,

v.

PUBLIX SUPERMARKETS, INC., Defendants-Appellees.

April 13, 2000.

Appeal from the United States District Court for the Southern District of Florida (No. 96-14235-CV-NCR), Norman C. Roettger, Jr., District Judge.

Before BIRCH and MARCUS, Circuit Judges, and ALAIMO,* Senior District Judge.

* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

BIRCH, Circuit Judge:

Connie Lynn Madray and Melody Holden (collectively, "plaintiffs") appeal the district court's order granting summary judgment to Publix Super Markets, Inc. ("Publix") and dismissing their claims against Publix for hostile environment sexual harassment, in violation of

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, as amended. The plaintiffs argue that Publix is not entitled to the affirmative defense to vicarious liability for sexual harassment announced by the Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), (the "*Faragher* affirmative defense") because questions persist about (1) whether Publix exercised due care to prevent sexual harassment in its store, (2) when Publix became aware of the sexual harassment to which the plaintiffs were being subjected, and (3) whether the plaintiffs utilized the appropriate procedures for reporting sexual harassment.[1] For the reasons that follow, we AFFIRM the holding of the district court.

I. BACKGROUND

Holden has worked in Publix store number 118 in Okeechobee, Florida since 1987. She continues to be employed as a scan price clerk in store 118. Madray worked at store 118 from 1990 until April 1997, when she

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[1] The plaintiffs also argue that a genuine issue of material fact exists as to whether the harassing behavior to which they were subjected by their manager was sufficiently severe or pervasive to satisfy the requirements for hostile environment sexual harassment. Although the district court noted "that the alleged behavior f[ell] short of other conduct that courts have held did not constitute a hostile environment," (R4-144 at 8 n. 3); *Madray, et al. v. Publix Super Markets, Inc.*, 30 F.Supp.2d 1371, 1375 n. 3 (S.D.Fla. 1998), the district court neither made a specific finding of whether the conduct at issue in this case was sufficiently severe or pervasive to constitute hostile work environment sexual harassment nor did the district court base its judgment upon such a finding. We will not address this issue, but will assume arguendo that Selph's conduct constituted sexual harassment.

moved to Georgia. She is now employed by Publix as a part-time stock clerk in Athens, Georgia. Ronald Selph became the manager of store 118 in 1994. As store manager, Selph was the highest ranking employee in store 118. Thus, he exercised supervisory authority over both Holden and Madray until he was transferred to store 61 as an assistant manager in September 1995.

From the commencement of his employment as manager of store 118, Selph made a practice of hugging and patting his employees. Selph explained that he engaged in this behavior in an effort to promote a family atmosphere at the store and increase productivity. The plaintiffs were not initially offended by Selph's behavior; however, over time, the plaintiffs contend that Selph's conduct escalated and became offensive.[2]

The plaintiffs first complained about Selph's harassing behavior to three mid- level managers at store 118. Holden testified that, at a party for a departing employee, she told Darlene Clark, a Second Assistant Manager, "[t]hat it made me sick for [Selph] to hug me and touch me and kiss me." (R3-82, Deposition of Melody Holden, at 58.) However, Holden did not request that Clark take any action as a result of her comment. *See id.* at 59. Rather, Holden "hop[ed] that

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[2] According to the plaintiffs, Selph's harassing behavior included groping, full-body hugs, rubbing his body against theirs in such a way that his genitals made contact with their body, kissing, blowing in their ear, wetting his finger in his mouth and sticking it in their ears, and rubbing their shoulders, backs, hips, and legs, as well as an array of suggestive and provocative comments. Because the question of whether this behavior amounted to hostile work environment sexual harassment is not appropriately before this court, we will not provide a detailed account of the alleged harassment.

[Clark would] take it in her own hands and do it because she's in management." *Id.* at 59.

About a month or two later, Holden testified that, while in a restaurant with several other employees of store 118, she told Second Assistant Manager Gary Priest that Selph had "grabbed me and ducked me over and kissed me on the neck." *Id.* at 62. While Holden did not request that Priest undertake any action regarding her complaint, she did tell him that she did not know what do about Selph's behavior. *See id.* at 63. Holden stated that Priest was "shocked" by her account of Selph's behavior and "didn't know what to say either." *Id.* at 62-63.

Holden also testified that approximately two to three weeks before she lodged a formal complaint against Selph, David Neff, the Bakery Manager, witnessed an incident of inappropriate behavior by Selph. According to Holden, Neff told Selph "That's sexual harassment," but Selph responded that he did not care what Neff called it. *Id.* at 125-26. Holden stated that when she thanked Neff for trying to stop Selph's inappropriate behavior, she explained that she hoped he would stop since Neff had told him it was sexual harassment. Neff replied: "Well, if it doesn't, you let me know. And if it still continues, if you don't complain about it, then I have to as a manager." *Id.* at 126. Holden responded that she would talk to Madray and make arrangements to see District Manager Richard Rhodes.

Approximately three or four days before Holden made her formal complaint, Priest actually witnessed Selph's inappropriate behavior towards Holden and made an effort to distract Selph from Holden. Additionally, Madray testified that a few days prior to lodging a formal complaint, Priest also witnessed Selph hugging her and

said, "I've seen too much. We need to talk to Mr. Rhodes." (R3-84, Deposition of Connie Lynn Madray, at 133.) Subsequently, Holden requested that Priest call district manager Rhodes and set up an appointment so that the plaintiffs could complain about Selph's harassing behavior towards them. Rhodes met with the plaintiffs the next day and began an investigation. The plaintiffs agreed that Rhodes was responsive to their complaints and was very upset because "[h]e said that the managers knew better and should have let him know what was going on." (R3- 82 at 132.) Upon completion of Rhodes' investigation, Selph was given a written warning, demoted to assistant manager, and transferred to a store in another city. After making the complaint neither plaintiff had any contact with Selph.[3]

Publix has promulgated a sexual harassment policy and disseminated it to employees in their employee handbook. The policy requires that the employees "bring

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[3] The plaintiffs also point to an incident where another female employee complained to mid-level managers about Selph's harassing behavior and they attempted unsuccessfully to handle the problem "in the store." (R4-141-102) (Maria Chesser's statement). Meat Manager Steve Pitts suggested that this incident happened at least six months prior to the plaintiffs' complaint to Rhodes. *(See* R4-141-88)(Steve L. Pitts 8/24/95 statement). The plaintiffs contend that this other employee's previous complaint to the mid-level managers provided Publix notice of Selph's sexual harassment as much as six months prior to their formal complaint. However, our conclusion that the plaintiffs' own complaints to the mid-level managers did not provide Publix effective notice of the harassment they were experiencing applies equally to the complaint of the other employee to mid-level managers. Thus, we conclude that the complaint of another employee to the mid-level managers in store 118 did not place Publix on notice of Selph's sexually harassing behavior.

[any complaints] to the attention of appropriate persons in Company Management.... [I]n order for the Company to deal with the problem, **we must report such offensive conduct or situations to the Store Manager, District Manager, or Divisional Personnel Managers.**" (R2-67-Ex. 4 at 3.)(emphasis in original).[4]

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[4] The pertinent part of Publix's "Statement Concerning Prohibited Harassment, Including Sexual Harassment" consists of the following:

> To help ensure that none of us ever feel we are being subjected to harassment, and in order to create a comfortable work environment, the Company prohibits any offensive physical, written or spoken conduct regarding any of these items, including conduct of a sexual nature.
>
> ....
>
> If any of us believe that he or she is being subjected to any of these forms of harassment, or believes he or she is being discriminated against because other associates are receiving favored treatment in exchange for, (example--sexual favors), he or she must bring this to the attention of appropriate persons in Company Management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with the appropriate Company representative. Consequently,. in order for the Company to deal with the problem, **we must report such offensive conduct or situations to the Store Manager, District Manager or Divisional Personnel Managers:**
>
> [list of individuals and telephone numbers by location]
>
> ....
>
> A record of the complaint and the findings will become a part of the complaint investigation record and the file will be

(continued...)

Additionally, Publix maintained an "Open Door Policy" which was also published in the employee handbook. This policy encouraged employees to talk to a manager about any "problems or misunderstandings." *Id.* at 1-2. This policy reminded employees that they could "talk to anyone in management," but encouraged them to first discuss their problem with their "immediate [s]upervisor" and then proceed to "the next highest level of management." *Id.*[5]

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[4](...continued)
maintained separately from the associate's personal file. Any person electing to utilize this complaint resolution procedure will be treated courteously. The complaint will be handled as swiftly and as confidentially as practical in light of the need to remedy the problem, and registering the complaint will in no way be used against the associate nor will it have adverse impact on the individual's employment status.

(R2-67-Ex. 4 at 2-4.)

[5] Publix's "Open Door Policy," as set forth in the employee handbook, provides the following:

> It is just a fact of life that occasionally there will be problems and misunderstandings among people. If something bothers you, or if you need clarification of a Publix policy or procedure, please talk to a manager about it. Always remember, as a Publix associate you can talk to anyone in management. Experience has shown, however, that many problems can best be worked out by the following steps:
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> 1. Discuss you problem or raise your question directly with your immediate Supervisor/Manager/Department Head.
>
> 2. If the matter is not resolved or you still have a question or concern, go to the next highest level of (continued...)

The plaintiffs filed suit against Publix and Selph, alleging hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*[6] The plaintiffs claimed that they were each subjected to an array of improper conduct by Selph as a condition of their employment, they were retaliated against by Selph after they reported his inappropriate conduct to other store management personnel, the management personnel to whom they reported Selph's conduct responded ineffectively, and they were ridiculed and embarrassed because Publix and its agents allowed their complaints to be made public. The plaintiffs further claimed that Publix was aware of Selph's behavior via the managers and supervisors in store 118, Publix was ineffective in curtailing the bad conduct, and, after transferring Selph from store 118,

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[5](...continued)

management (for example, Store Manager, District Manager, Regional Director of Retail Operations, or a Vice- President).

Just remember — you can discuss your problem with anyone in management all the way to the top level. Also, your Divisional Human Resources Department is available to assist you with any matter at any time, and you may contact the Employee Assistance Department in Lakeland for confidential counseling.

(R2-67-Ex. 4 at 1-2)(emphasis omitted).

[6] The plaintiffs also alleged violation of the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes, battery, intentional infliction of emotional distress, and invasion of privacy. Only the claims regarding Publix's alleged violation of Title VII are at issue in this appeal; therefore, we will not discuss the plaintiffs other allegations.

Publix allowed the plaintiffs' complaints to become public, thereby exposing them to further ridicule, embarrassment, and retaliation. The plaintiffs asserted that they had both suffered damages in the form of lost income and benefits, as well as nightmares and migraines. Additionally, Madray claimed she was demoted, scheduled to work fewer hours, and her schedule was changed to be less convenient for her family as a result of complaints against Selph.

Publix moved for summary judgment, arguing that it was not liable for Selph's conduct because it had a well-disseminated anti-harassment policy in force and it responded immediately to the plaintiffs' complaints. Selph also moved for summary judgment, adopting Publix's arguments and further asserting that the facts as set forth by the plaintiffs failed to satisfy the requirements for the state law claims of battery and invasion of privacy. The plaintiffs replied that Publix should be considered to have had notice of Selph's behavior beginning with Holden's initial complaint to Second Assistant Manager Darlene Clark, as much as six months prior to the initiation of District Manager Rhodes' investigation. Therefore, the plaintiffs argued that Publix's response to the plaintiffs' complaints could not be considered prompt.

The district court concluded that Publix was not liable for Selph's alleged harassment because Publix had exercised reasonable care to prevent sexual harassment by promulgating an anti-harassment policy, of which the plaintiffs were aware, and Publix responded promptly and effectively to stop the alleged harassment once the plaintiffs utilized the policy's established reporting procedures. The district court found that the plaintiffs failed to follow the procedures established by Publix's

sexual harassment policy because they were afraid of potential negative consequences. The court further found that it was unreasonable for the plaintiffs not to take advantage of the preventive and corrective procedures developed by Publix because Publix's policy was unambiguous and the plaintiffs admitted that they knew and understood the sexual harassment policy. The district court noted that "[t]o permit an employee to disregard a policy of which she was admittedly aware based on generalized fears would require an employer to be automatically liable for harassment committed by a supervisor." (R4-144 at 10-11.) Accordingly, the district court granted Publix's motion for summary judgment on the plaintiffs' claims for hostile work environment sexual harassment and dismissed the plaintiffs' federal claims with prejudice.[7]

II. DISCUSSION

We review the district court's order granting summary judgment de novo. *See Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1441 (11th Cir. 1998). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

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[7] The district court also granted Selph's motion for summary judgment regarding the Title VII claims because the relief available under Title VII is against the employer, not the alleged harasser. Additionally, the district court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims for battery, invasion of privacy, and violation of the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes and dismissed those claims without prejudice. The plaintiffs do not appeal these actions.

matter of law." FED.R.CIV.P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). In making this assessment, we "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997), and "resolve all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990).

In 1998, the Supreme Court delivered two opinions which provided increased guidance on the circumstances under which an employer should be found vicariously liable for the hostile work environment created by a supervisory employee's sexual harassment. *See Burlington Indus.*, 524 U.S. at 755-765, 118 S.Ct. at 2265-70; *Faragher*, 524 U.S. at 785-808, 118 S.Ct. at 2282-93. In these cases, the Supreme Court utilized common law agency principles to establish that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93; *see also Burlington Indus.*, 524 U.S. at 765, 118 S.Ct. at 2270. However, the Supreme Court also created an affirmative defense providing employers a safe harbor from vicarious liability when the victimized employee suffered no adverse tangible employment action. *Id.* at 807, 118 S.Ct. at 2293; *see also Burlington Indus.*, 524

U.S. at 765, 118 S.Ct. at 2270. The employer must satisfy two elements to successfully interpose this defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*; *see also Burlington Indus.*, 524 U.S. at 765, 118 S.Ct. at 2270.

The district court concluded that Publix had fulfilled the requirements of the first element of the *Faragher* affirmative defense by promulgating the anti-harassment policy and then acting promptly to stop Selph's harassment once the plaintiffs complained to Rhodes. Next, the district court determined that the second element had been satisfied by the plaintiffs' failure to contact any of the individuals identified for reporting offensive conduct or situations by Publix's "Statement Concerning Prohibited Harassment, Including Sexual Harassment."

On appeal, the plaintiffs argue that Publix does not meet the requirements for the *Faragher* affirmative defense. First, the plaintiffs assert that Publix's "Statement Concerning Prohibited Harassment, Including Sexual Harassment" does not demonstrate that Publix "exercised reasonable care to prevent such harassment" because the policy is too narrow and identifies only one person in each store, the store manager, as available to address sexual harassment complaints. Additionally, the plaintiffs suggest that the failure of the mid-level managers to whom they complained to respond demonstrates that Publix failed to take reasonable care to prevent harassment in its stores. Second, the plaintiffs contend that Publix did not respond

promptly to correct Selph's sexually harassing behavior. The plaintiffs assert that Publix should be considered to have had notice of Selph's harassing behavior when they first complained to Second Assistant Manager Darlene Clark months before District Manager Rhodes undertook his investigation and remedial action. Therefore, Rhodes' actions cannot be considered a prompt corrective response. Finally, the plaintiffs argue that their decision to report Selph's harassing behavior to the mid-level managers within store 118, rather than the individuals delineated in Publix's sexual harassment policy, was not unreasonable given Publix's Open Door Policy which encouraged employees to talk to "anyone in management" regarding problems and further recommended that employees first discuss these problems with their "immediate Supervisor/ Manager/ Department Head." (R2-67-Ex.4 at 1-2.) We will address each of these arguments in turn.[8]

A. Employer's Reasonable Care To Prevent Sexual Harassment

When crafting the first prong of the *Faragher* affirmative defense which requires, in part, that the employer exercise reasonable care to prevent sexual harassment, the Supreme Court sought to give effect to Title VII's deterrent purpose. *See Faragher*, 524 U.S. at

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[8] Although Madray initially claimed that she was demoted, scheduled to work fewer hours, and that her schedule was changed to be less convenient to her family, the plaintiffs do not argue on appeal that they suffered any adverse, tangible employment action. Therefore, we do not address this issue. *See Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1345 (11th Cir. 1999) (stating that issues not argued on appeal are deemed abandoned), *petition for cert. filed*, ___ U.S.L.W. ___, (U.S. Feb. 23, 2000) (No. 98-2610).

806, 118 S.Ct. at 2292 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *Burlington Indus.*, 524 U.S. at 764, 118 S.Ct. at 2270 (noting that making employer liability contingent "in part on an employer's effort to create [antiharassment policies and effective grievance] procedures, ... would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures") (citation omitted). Accordingly, the Supreme Court implied that employers could meet the initial burden in determining whether they had exercised reasonable care to prevent sexual harassment by promulgating an anti- harassment policy. *See Faragher*, 524 U.S. at 807, 118 S.Ct. at 2293 ("While proof that an employer had promulgated an antiharassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *see also Burlington Indus.*, 524 U.S. at 765, 118 S.Ct. at 2270. The Supreme Court further determined, when applying the new affirmative defense, that dissemination of an employer's anti-harassment policy was fundamental to meeting the requirement for exercising reasonable care in preventing sexual harassment. *See Faragher*, 524 U.S. at 808, 118 S.Ct. at 2293 (noting that it appeared the defendant employer would be unable to utilize the affirmative defense because it "had entirely failed to disseminate its policy against sexual harassment among [its] ... employees"). There is no dispute that Publix promulgated and effectively disseminated complaint

procedures as a part of its sexual harassment policy. Rather, the plaintiffs contend that Publix did not exercise reasonable care to prevent the supervisor's harassing behavior because the complaint procedures in Publix's sexual harassment policy identify only one person in an employee's store who can be contacted regarding sexual harassment, the store manager.

We recognize that the wide variety of employment settings make it difficult to establish a uniform test for determining whether an employer's anti-harassment policy complaint procedures demonstrate the employer's reasonable care in preventing sexual harassment. The employer's size, location, geographic scope, organizational structure, and industry segment are just some of the characteristics that impact the analysis of whether the complaint procedures of an employer's anti-harassment policy adequately fulfill Title VII's deterrent purpose. Nonetheless, the Supreme Court did provide some guidance regarding the minimum requirement for an anti-harassment policy's complaint procedures to be considered effective. The Court noted that Title VII's deterrent purpose was clarified by a 1990 policy statement from the Equal Employment Opportunity Commission (EEOC) "enjoining employers to establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.'" *Faragher*, 524 U.S. at 806, 118 S.Ct. at 2292 (quoting EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (March 19, 1990)) (alteration in original); *see also Burlington Indus.*, 524 U.S. at 764, 118 S.Ct. at 2270 (citing EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (March 19, 1990)). Publix's sexual harassment policy meets the standard established by the EEOC's 1990 policy statement by providing to

employees alternative avenues for lodging a complaint other than a harassing supervisor. Although the store manager was the only designated company representative located within each store and, in this case, was the alleged harasser, Publix's policy also designated several additional individuals to whom an employee could complain regarding harassment.

These other designated, appropriate company representatives were accessible to Publix's store employees. District Manager Rhodes visited store 118 at least once each week and phone numbers, including a toll-free phone number, were provided for other appropriate company representatives to whom an employee could complain about a supervisor's sexual harassment. *See Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) (concluding that a sexual harassment policy was reasonable when the offending supervisor's immediate supervisor "visited the store approximately every two to three weeks"), *cert. denied*, ___ U.S.___, 120 S.Ct. 790, 145 L.Ed.2d 666 (2000). Additionally, the Publix complaint procedures provided employees multiple avenues for lodging a sexual harassment complaint outside the supervisory chain of command. *See id.* at 811-812 (finding a sexual harassment policy to be reasonable when it made it clear that sexual harassment would not be tolerated, was both specific and detailed, provided multiple mechanisms for the prompt resolution of complaints, and allowed the complainant to circumvent the supervisory chain of command). Therefore, we conclude that the complaint procedures established by Publix's sexual harassment policy meet the minimum requirements for the *Faragher* affirmative defense because the procedures did not require that the employee complain to the offending supervisor or through the supervisor's chain of command and the

procedures provided multiple avenues of lodging a complaint to assessable, designated representatives.

Moreover, the complaint procedures established by Publix's sexual harassment policy are similar to those in the policy we found to be reasonable in *Coates v. Sundor Brands*, 164 F.3d 1361, 1364 (11th Cir. 1999) (per curiam). *See id.* at 1369 (concluding that the policy directing employees who have been sexually harassed to "immediately contact their line manager, Personnel Contact, or other manager with whom they feel comfortable" was a reasonable policy). Similarly, our sister circuits have found more narrowly drawn anti-harassment policies to satisfy the requirement that an employer exercise reasonable care to prevent sexual harassment. *See Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir. 1999) (finding that promulgation of a policy which identified only an employee's supervisors and the company's Human Resources Department as the appropriate vehicles for registering a sexual harassment complaint and dissemination of that policy to employees satisfied the requirement that an employer exercise reasonable care to prevent sexual harassment); *see also Watkins v. Professional Security Bureau, Ltd.*, 201 F.3d 439 (4th Cir. 1999) (per curiam) (concluding a policy was reasonable when employee was not placed in the position of having to report their supervisor's conduct to someone in the supervisors's chain of command); *Ritchie v. Stamler Corp.*, No. 98-5750 (6th Cir. Jan. 12, 2000) (per curiam) (finding a policy which only allowed sexual harassment complaints to be made in writing to the president of the company reasonable).[9]

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[9] These are unpublished opinions cited solely for their persuasive value pursuant to 4th Cir. R. 36(c) and 6th Cir. R. 28(g),

(continued...)

Therefore, because we find no inherent defect in the complaint procedures established by Publix's sexual harassment policy, nor any evidence that the policy was administered in bad faith, we conclude that Publix exercised reasonable care to prevent sexual harassment. *Cf. Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (noting that where "there is no evidence that an employer adopted or administered an antiharassment policy in bad faith or that the policy was otherwise defective or dysfunctional, [its] existence ... militates strongly in favor of a conclusion that the employer 'exercised reasonable care to prevent' and promptly correct sexual harassment") (quoting *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2293).

B. Employer's Reasonable Care To Correct Promptly Sexual Harassment

In applying the *Faragher* affirmative defense, we have noted that "the employer's notice of the harassment is of paramount importance [because] if the employer had notice of the harassment ... then it is liable unless it took prompt corrective action." *Dees v. Johnson Controls World Services*, 168 F.3d 417, 422 (11th Cir. 1999). Therefore, we must determine when Publix had notice of Selph's harassing behavior in order to evaluate the alacrity of its response.

This inquiry is facilitated by the identification of the "appropriate Company representative" to whom employees should register their complaints in the Publix's sexual harassment policy. (R2-67-Exh. 4 at 2-4.) Publix required that its employees report harassing behavior to

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[9](...continued)
respectively.

either the Store Manager, District Manager, or Divisional Manager and went so far as to list the names and phone numbers for some of the appropriate company representatives in various locations. *See id.* Therefore, by this policy, Publix established that when one of the delineated "appropriate Company representatives" was contacted regarding harassment, it then had been given notice sufficient to obligate it to make a prompt corrective response. *See Coates*, 164 F.3d at 1364 (noting that when an employer's sexual harassment policy clearly specifies the steps an employee should take to alert the employer of sexual harassment, the employer has, by the policy, "itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures").

The plaintiffs contend that Publix should be deemed to have been on notice prior to their meeting with District Manager Rhodes, an appropriate company representative, via their complaints to various mid-level managers, not designated as appropriate company representatives by the anti-harassment policy. However, as we have noted, once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then "it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances." *Farley v. American Cast Iron Pipe*, 115 F.3d 1548, 1554 (11th Cir. 1997). *See also Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997) (noting that when an employer has identified and appointed a recipient for sexual harassment complaints, "complainants can be expected to utilize it"). Therefore, we conclude that Publix cannot be considered to have been placed on notice of Selph's

harassing behavior by the plaintiffs' informal complaints to individuals not designated by Publix to receive or process sexual harassment complaints.

Moreover, even if we considered the mid-level managers to whom the plaintiffs complained agents of Publix placing it on notice of Selph's behavior, the context surrounding the plaintiffs' comments to these individuals compels the conclusion that these mid-level managers could not reasonably have been expected to act to address the plaintiffs' complaints. *Cf. Coates*, 164 F.3d at 1365 (concluding that an employer has not been given adequate notice of sexual harassment to require action when an employee provided to an appropriate company representative a harassing note she received from her supervisor, but did not indicate that the note "represented a problem about which she was concerned or that required [the manager's] immediate attention," or "that the note was only the latest in an on-going pattern of sexually harassing behavior," and "the primary purpose for seeking out [the manager] was to discuss not the harassment," but other matters).

1. Conversation with Darlene Clark

Holden complained to Second Assistant Manager Clark at a restaurant during a party for a departing employee. She only told Clark that Selph's behavior "made me sick." (R3-82 at 58.) Nothing Holden said to Clark disclosed the extent or precise nature of Selph's behavior towards Holden. Clark could not have been expected to take corrective action on the basis of this informal, general complaint.

2. Conversations with Gary Priest

Holden next complained to Second Assistant Manager Priest while eating dinner in a restaurant with several other employees. Here, she relayed a particular incident where she found Selph's behavior offensive. Holden did not indicate that this incident was part of an on-going pattern of sexually harassing behavior or that she wanted Priest to take action to stop Selph's inappropriate behavior. Again, Priest could not have been expected to take action to address the singular incident recounted by Holden during a dinner gathering.

Additionally, Holden asserts that approximately three or four days before she lodged a formal complaint, Priest witnessed Selph's harassment of Holden. Again, the deposition testimony suggests that at that time Priest knew of only two occasions where Selph behaved inappropriately towards Holden — the one incident described by Holden during dinner and the incident he witnessed. Knowledge of these two isolated incidents is not sufficient to indicate Priest should have known Selph was engaging in a consistent pattern of harassment towards Holden or to create a reasonable expectancy that he would take corrective action against Selph. Moreover, when Priest witnessed the subsequent incident where Selph hugged Madray, Priest did take action, indicating that they needed to speak with District Manager Rhodes.

3. Discussion with David Neff

After Bakery Manager Neff witnessed Selph's harassment of Holden, Holden assured him that she would report Selph's behavior to Publix through District Manager Rhodes, one of the appropriate company representatives designated in Publix's sexual harassment

policy. The communication between Neff and Holden demonstrates that Holden knew and understood Publix's established procedure for reporting sexual harassment and intended to lodge the formal complaint herself rather having Neff take action. Neff could not reasonably be expected to take corrective action when Holden insisted that she would contact District Manager Rhodes herself to inform him of Selph's behavior towards her.

Nothing in the plaintiffs' complaints to mid-level managers prior to their meeting with Rhodes indicates that these managers' failure to take prompt action to stop Selph's harassment was unreasonable. Neither plaintiff fully explained the full dimensions of their harassment by Selph to the mid-level managers or approached these mid-level managers in a professional capacity to request assistance with correcting Selph's behavior. Therefore, we conclude that Publix did not have adequate notice of Selph's harassing behavior through the mid-level managers. Publix can first be charged with notice of Selph's behavior when the plaintiffs requested a meeting with District Manager Rhodes. The plaintiffs do not dispute that Rhodes responded promptly to end their harassment by Selph. Accordingly, we find that Publix did exercise reasonable care to correct promptly Selph's sexually harassing behavior.

C. Employee's Reasonable Use of Preventative or Corrective Opportunities

"[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, demonstration of such failure will normally suffice to satisfy the employer's burden under the second element

of the [affirmative] defense." *Faragher*, 524 U.S. at 807-808, 118 S Ct. at 2293; *see also Burlington Indus.*, 524 U.S. at 765, 118 S.Ct. at 2270. The plaintiffs admit that they knew the appropriate complaint procedures and understood whom they should contact according to Publix's sexual harassment policy. Their understanding of these procedures was illustrated by Holden's response to Bakery Manager Neff that she would contact District Manager Rhodes to lodge a complaint against Selph after Neff witnessed Selph's harassing behavior. Yet, despite knowing exactly who they should contact regarding sexual harassment, the plaintiffs chose to complain informally to managers that were not authorized to receive such complaints under the Publix sexual harassment policy.

The plaintiffs contend that they chose to complain to the mid-level managers within store 118 in accordance with Publix's Open Door Policy. Therefore, they assert that their decision to discuss Selph's behavior with these managers, rather than those individuals identified by the sexual harassment policy, was not unreasonable and that they reasonably took advantage of preventative and corrective opportunities Publix made available--the Open Door Policy. The district court concluded that the plaintiffs had not adequately followed the procedures of the Open Door Policy to satisfy their duty to report Selph's sexually harassing behavior because that policy requires that "if a problem is not resolved, the employee should go to the next highest level of management, to the top level if necessary." (R4-144 at 10.) While we note that "[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law," we, nonetheless, conclude that the plaintiffs failed to reasonably utilize the complaint procedures provided

by Publix's Open Door Policy. *Williamson v. City of Houston*, 148 F.3d 462, 467 (5th Cir. 1998); *see also Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65 (2nd Cir. 1998) (rejecting the argument that an anti-harassment policy can create "an affirmative duty [for the plaintiff] to bring her allegations to the company's attention in more than one way when she believes the company's response to her harassment claim is inadequate.... When a plaintiff reports harassing misconduct in accordance with company policy, she is under no duty to report it a second time before the company is charged with knowledge of it."). The plaintiffs complained to the mid-level managers within store 118 during informal, often social, circumstances. They did not fully inform the mid-level managers of the extent of the harassment Selph directed towards them, nor did they request that the mid-level managers take any action to stop Selph's harassment. In fact, on at least one occasion the plaintiffs declined the assistance of a mid-level manager and insisted that they would take action themselves in accordance with the sexual harassment complaint procedures. Therefore, we can find no basis upon which a reasonable fact-finder could conclude that the plaintiffs reasonably availed themselves of the preventive and corrective opportunities provided by either Publix's sexual harassment policy or its Open Door Policy.

As we have noted, "the problem of workplace discrimination ... cannot be [corrected] without the cooperation of the victims." *Coates*, 164 F.3d at 1366. Here, we conclude that the plaintiffs unreasonably delayed utilizing the complaint procedures established by Publix's sexual harassment policy and they concede that Publix responded promptly once they cooperated by providing the company notice via its established complaint procedures. *Cf. Montero*, 192 F.3d at 863

(finding an employee's delay in utilizing an employer's established complaint procedures equated to unreasonably failing to take advantage of the company's preventive and corrective opportunities). Therefore, we conclude that the second prong of the *Faragher* affirmative defense is satisfied with regard to Publix's vicarious liability before District Manager Rhodes was notified of Selph's behavior.

III. CONCLUSION

Publix promulgated an effective sexual harassment policy with appropriate complaint procedures, disseminated this information to its employees, and made a good-faith effort to enforce the policy; therefore, Publix satisfied the standards for exercising reasonable care to prevent sexual harassment. As a result, Publix cannot be charged with notice of the harassment via the plaintiffs' earlier, informal complaints to mid-level managers within their store who were not designated to receive complaints of sexual harassment under Publix's anti-harassment policy.

Publix responded promptly to correct the alleged harassment when it received effective notice by the plaintiffs' complaints to a designated, appropriate company representative. Finally, the plaintiffs acted unreasonably in delaying their use of the complaint procedures established by Publix. Therefore, we conclude that Publix is entitled to interpose the affirmative defense established in *Faragher* and *Burlington Indus.* to eliminate its vicarious liability for the sexual harassment the plaintiffs experienced. Accordingly, we AFFIRM the decision of the district court.

APPENDIX B — SUMMARY FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED OCTOBER 28, 1998.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Connie Lynn MADRAY, et al., Plaintiffs,
v.
PUBLIX SUPER MARKETS, INC., Defendant.

No. 96-14235-Civ
Norman C. Roettger

United States District Court,
S.D. Florida.

Oct. 28, 1998.

THIS CAUSE is before the Court upon motions for summary judgment (docket entries 64 & 69) filed by defendants, Publix Super Markets ("Publix") and Ronald Selph ("Selph"). Plaintiffs, Connie Lynn Madray ("Madray") and Melody Holden ("Holden"), brought this action alleging defendants[1] violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* by subjecting plaintiffs to a hostile work environment (Counts I & II); committed battery (Counts III & IV) and invasion of privacy (Counts V & VI) and violated the Florida Civil

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[1] To the extent that plaintiffs seek to hold Selph liable under Title VII, summary judgment is granted on behalf of defendant. The relief granted under Title VII is against the employer, not the individual employee whose actions would constitute a violation of the act. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

Rights Act of 1992, Chapter 760, Florida Statutes (Counts VII & VIII).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). A party who moves for summary judgment must demonstrate that there are no genuine disputes as to any material facts with respect to issues for which that party bears the burden of proof at trial. As to issues for which the non-moving party bears the burden, the movant need only establish that, after adequate time for discovery, there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In determining whether the movant has met these burdens, the court must view the evidence and all permissible factual inferences in a light most favorable to the non-moving party. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant, for its part, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. 1348; *Samples v. City of Atlanta*, 846 F.2d 1328, 1331 (11th Cir. 1988). Rather than merely alleging the existence of some factual dispute, the non-moving party must rebut any facts properly presented by way of affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, to survive a motion for summary judgment, the non-moving party must come

forward with specific evidence of every element material to his case so as to create a genuine issue for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

STATEMENT OF FACTS

Viewing the evidence in the light most favorable to plaintiffs, the facts are as follows. Selph was employed by Publix as store manager at store number 118 in Okeechobee, Florida from 1994 until September 1995. Plaintiffs were employed at the store during the same period and Selph was their supervisor. Plaintiff Holden is still employed at store number 118; plaintiff Madray worked at the store until April 1997 when she was transferred at her request to a store in Athens, Georgia.

From the commencement of his employment as store manager, it was Selph's practice to hug and pat employees. During his deposition, Selph stated that the purpose of his behavior was to promote a family atmosphere at the store and increase productivity. Initially, neither plaintiff was offended by Selph's behavior and believed he was just being friendly.

However, with the passage of time, plaintiffs contend Selph's conduct became offensive. Madray stated during her deposition that Selph hugged her on several occasions and that these were inappropriate in light of the tightness of the embrace. She also stated that Selph would rub his body against her back while purportedly reaching for items on a shelf in his office so that his genitals made contact with her back. Selph also made unwanted contact by straightening her necklace, blowing in her ear and, on one occasion, giving her a good morning kiss on the cheek.

Holden describes similar instances of unwanted physical contact. For example, Holden alleges that Selph dipped Holden as if to dance and kissed her on the neck. On another occasion, when she jokingly accused Selph of being a traitor for reporting a problem with a tobacco shipment, he grabbed her around the legs and begged for her forgiveness.

Madray also alleges that Selph made several suggestive comments. When her husband suffered an abdominal injury, Selph said that if her husband "couldn't take care of her, he could ...." When giving Madray an invitation to a company breakfast, he told her "be sure to wear something sexy because I'm going with you ...."

Holden also claims that she was subjected to distasteful comments. In an exchange involving the fattening quality of ice cream, Selph stated to Holden "I'll work it off of you ...." On another occasion, he said that he "got it up for her." Although Selph contends he was referring to a computer difficulty which he repaired, Holden states that Selph made provocative gestures.

Plaintiffs complained concerning Selph's conduct to Second Assistant Manager Darlene Clark, Second Assistant Manager Gary Priest and Bakery Manager David Neff. These individuals were subordinates of Selph. Plaintiffs spoke with Clark at a restaurant during a social event. Ms. Clark allegedly responded that he had hugged her as well and took no action.

Holden stated that Neff witnessed an incident in which Selph touched Holden's hair. Neff told Selph that his conduct was harassment and told Holden, outside of Selph's presence, that if the conduct continued, he would take further action. Holden did not request that Neff take

further action and stated that she would discuss the matter with Madray and make arrangements to see District Manager Richard Rhodes.

Holden also complained to Priest while socializing outside of work. He took no action at that time. Several months later, he witnessed Selph rubbing Holden's back. Selph told Priest not to interrupt when he was hugging or touching a beautiful woman.

Shortly thereafter, Priest contacted District Manager Richard Rhodes upon request of plaintiffs. Rhodes met with plaintiffs the next day and began an investigation. According to plaintiffs, during that meeting Rhodes stated that the assistant managers to whom they had complained should have told him. The next day, Selph was given a written warning, demoted and transferred to a store in another city. Madray never worked with Selph again after making the complaint; Holden worked half a day with Selph but had no contact with him.

Publix had adopted a sexual harassment policy which was disseminated to its employees in the form of a handbook. Plaintiffs admit that they were given a copy of the handbook when hired by Publix and that they were aware of the procedures contained therein regarding sexual harassment. Plaintiffs were hired prior to Selph's employment at store number 118. Holden remarked in her deposition that the handbook was "... very explicit." For ease of reference the pertinent portions of the handbook are set forth in footnote form.[2]

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[2] In a section entitled "Open Door Policy", the handbook sets forth:

(continued...)

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[2](...continued)
It is just a fact of life that occasionally there will be problems and misunderstandings among people. If something bothers you, or if you need clarification of a Publix policy or procedure, please talk to a manager about it. Always remember, as a Publix associate, you can talk to anyone in management. Experience has shown, however, that many problems can best be worked out by the following steps:

1. Discuss your problem or raise your question directly with your immediate Supervisor/Manager/Department Head.

2. If the matter is not resolved or you still have a question or concern, go to the next highest level of management (for example, Store Manager, District Manager, Regional Director of Retail Operations, or a Vice- President).

Just remember — you can discuss your problem with anyone in management all the way to the top level. Also, your Divisional Human Resources Department is available to assist you with any matter at any time, and you may contact the Employee Assistance Department in Lakeland for confidential counseling.

In the section entitled "Statement Concerning Prohibited Harassment, Including Sexual Harassment", Publix sets forth that sexual harassment is prohibited, defines sexual harassment and explains the complaint procedure to be followed. This procedure is as follows:

If any of us believe that he or she is being subjected to any of these forms of harassment, or believe he or she is being discriminated against because other associates are receiving favored treatment in exchange for, (example — sexual favors)[sic], he or she must bring this to the attention of appropriate persons in Company Management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with the appropriate Company representative.
(continued...)

Plaintiffs did not follow procedures in the handbook because they feared repercussions for making a complaint. However, plaintiffs admit that their pay and hours of work were not affected. They were not demoted or transferred, nor were their benefits affected or reduced after they complained of harassment.

CONCLUSIONS OF LAW

An employer is subject to vicarious liability to an employee for an actionable hostile environment created by a supervisor with authority over the employee. *Burlington Industries v. Ellerth*, 524 U.S. 742, ___, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998). The parties agree that Selph occupied a position of supervisory authority over plaintiffs. Therefore, if his actions resulted in a hostile work environment. Publix would be vicariously liable to plaintiffs for those actions subject to

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[2](...continued)
Consequently, in order for the Company to deal with the problem, we must report such offensive conduct or situations to the Store Manager, District Manager or Divisional Personnel Managers ....

A record of the complaint and the findings will become a part of the complaint investigation record and the file will be maintained separately from the associate's personal file.

Any person electing to utilize this complaint resolution procedure will be treated courteously. The complaint will be handled as swiftly and as confidentially as practical in light of the need to remedy the problem, and registering the complaint will in no way be used against the associate nor will it have adverse impact on the individual's employment status.

any affirmative defenses. As Publix presents such a defense, the court will assume without deciding the existence of a hostile work environment.[3]

When the harassment results in no tangible employment action, an employer will not be liable if: (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington*, 118 S.Ct. at 2270. The promulgation of a workable anti-harassment policy satisfies the first element's reasonable care standard. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662 (1998). An employee's failure to use the complaint procedure administered by an employer satisfies the second

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[3] For a hostile environment to be actionable, it must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19-22, 114 S.Ct. 367, 370-371, 126 L.Ed.2d 295, (1993). In determining whether a hostile environment exists, the court must consider all circumstances including the frequency of the conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* 114 S.Ct. at 371. However, the prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace. *Oncale v. Sundowner Offshore Services Incorporated*, 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998). The court notes that the alleged behavior falls short of other conduct that courts have held did not constitute a hostile environment. *See Koelsch v. Beltone Electronics*, 46 F.3d 705 (7th Cir. 1995) and *Gearhart v. Eye Care Centers of America*, 888 F.Supp. 814 (S.D.Tex. 1995).

element. *Burlington*, 118 S.Ct. at 2269. An employee's generalized fear of repercussions cannot form the basis for an employee's failure to complain to his or her employer. *Fierro v. Saks Fifth Avenue*, 1998 WL 388971 (S.D.N.Y. 1998).

It is undisputed that Publix has a policy against sexual harassment of which plaintiffs were admittedly aware that sets forth a specific complaint procedure with the appropriate persons in management to be contacted. Employees are provided with the option to contact the Store Manager, District Manager or Divisional Personnel Managers. In providing several avenues, an employee can avoid having to file a complaint with the alleged perpetrator. The policy advises employees that by the very nature of harassment, it might be impossible to detect unless complaints are registered with the appropriate person. Also, employees are assured that the process will be as confidential as possible and that complaints would in no way be used against them.

It is also undisputed that plaintiffs did not follow the procedures set forth in the sexual harassment policy for some time based on a fear of negative consequences. However, when the first appropriate person (District Manager Rhodes), as identified in the sexual harassment policy, was contacted, an investigation was immediately instituted and plaintiffs suffered no further harassment.

Plaintiffs contend that the affirmative defense should not be available to Publix. They contend that the policy manual itself is confusing and that they believed they had followed the appropriate procedures by advising people in management, Clark, Neff and Priest.

First, it should be noted that plaintiffs admitted

during their deposition that they knew District Manager Rhodes was the individual to be contacted. Second, the manual itself is unambiguous. Plaintiffs rely on the fact that in the section entitled "open door policy", the handbook sets forth that problems may be discussed with an employee's immediate supervisor, manager, department head or anyone in management. In complaining to Clark, Neff and Priest, plaintiffs contend they had placed Publix on notice of the problem. However, the very section upon which they rely sets forth that if a problem is not resolved, the employee should go to the next highest level of management, to the top level if necessary. Further, the handbook contains a section which specifically deals with sexual harassment and the procedures to be followed. Plaintiff Holden admitted that this section was very explicit.

Armed with the knowledge contained in the policy manual, which they chose not to follow, plaintiffs unreasonably failed to take advantage of preventative or corrective opportunities provided by Publix. To permit an employee to disregard a policy of which she was admittedly aware based on generalized fears would require an employer to be automatically liable for harassment committed by a supervisor. This is a result which the Supreme Court expressly sought to avoid. *See Faragher*, 118 S.Ct. at 2291-2293.

Therefore, upon consideration of the motions and the record herein, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' motions for summary judgment with respect to plaintiffs allegations that defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000, *et seq.* by subjecting plaintiffs to a hostile work environment (Counts I & II) are hereby GRANTED. Plaintiffs' federal claims are DISMISSED with prejudice.

2. The court, pursuant to 28 U.S.C. 1367(c)(3), hereby declines to exercise supplemental jurisdiction over plaintiffs' state law claims for battery (Counts III & IV), invasion of privacy (Counts V & VI) and violation of the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes (Counts VII & VIII). 28 U.S.C. 1367(d) provides that the statute of limitations is tolled while state law claims are pending in federal court until thirty days after an order of dismissal. Therefore, plaintiffs may pursue these claims in state court if they so choose, as long as they file in a timely manner. Plaintiffs' state law claims are hereby DISMISSED without prejudice.

3. All pending motions are denied as moot. The Clerk of Court is directed to close this case.

Supreme Court, U.S.
FILED
SEP 8 2000
CLERK

No. 00-66

IN THE

Supreme Court of the United States

CONNIE LYNN MADRAY
and MELODY HOLDEN,

Petitioners,

v.

PUBLIX SUPER MARKETS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent submits that, upon a fair reading of the decision of the Court of Appeals and of the facts considered, the issues should be restated as follows:

I. Where an employer promulgates a sexual harassment policy reasonably designating accessible persons responsible for receiving and addressing complaints, may an employee seek damages for the time during which the employee delayed in contacting the designated persons and using the known procedure, which was immediately effective when used?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment through discussion of an employee with a lower level supervisor (subordinate to the alleged perpetrator) who is not designated to receive or address complaints in a known sexual harassment procedure, is not requested to take the complaint higher or take any action, and receives limited information (not the hostile-environment sexual harassment allegation)?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Publix Super Markets, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Rule:

Supreme Court Rule 15 1

STATEMENT OF THE CASE

In accordance with Supreme Court Rule 15, the following are perceived misstatements or omissions of fact bearing on the issues brought before the Court.

As found by the District Court and an unanimous Eleventh Circuit panel, it is undisputed that Respondent Publix Super Markets, Inc. ("Publix" or "Respondent") had implemented a sexual harassment policy whereby employees "must report such offensive conduct or situations to the Store Manager, District Manager or Divisional Personnel Managers"[1] or the Employee Assistance Coordinator, and that the Petitioners Holden and Madray ("Petitioners") admittedly knew and understood the complaint procedures and whom they should contact. Yet, Petitioners unreasonably delayed in using the complaint procedures to report alleged sexual harassment, although the first designated person (the District Manager) was readily accessible. When contacted by Petitioners, the District Manager immediately instituted corrective action regarding the alleged perpetrator, the Store Manager (Selph), removing him from the store, never to return or be seen by Petitioners again.

In seeking to recover damages during their delay, Petitioners point to an incident witnessed by a manager (bakery manager Neff) subordinate to the Store Manager. As found below, this occurred two to three weeks before the District Manager was contacted and took corrective action. Further, Neff stopped the offensive action at the time and told Petitioner Holden that if it continued, and she did not

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1. Which Divisional Personnel Managers were listed by name.

complain, he would take further action. Petitioner Holden responded that she would talk with Petitioner Madray and make arrangements to see the District Manager. As Petitioners acknowledge, shortly thereafter, this led to contact with the District Manager and immediate corrective action.

Petitioners also refer to several comments which they earlier made to other subordinate managers, the context of which, as found below, lacked reasonable notice to Publix or to the subordinate manager given the limited information provided, the social context and the lack of an adequate complaint in a professional capacity. Petitioners refer to one discussion with a female second assistant manager[2] (Clark) at a party at a restaurant where Petitioner Holden said that it made her sick for the Store Manager to hug, touch, and kiss her.[3] A month later, at a social occasion at a restaurant for dinner, dancing, and drinking, Petitioner Holden told another second assistant manager (Priest) of one incident where the store manager kissed her on the neck. It is undisputed that neither Petitioner then asked either of the subordinate managers to take their complaint higher. It was found below that in these circumstances and without any complaint explaining the dimensions of the alleged harassment, these limited comments at parties cannot be considered adequate notice of the Store Manager's alleged sexual harassment to Publix. Notably, when Petitioners decided to complain to the District Manager, they told Priest that they wanted to file a complaint and asked if he could help them out, and he did so immediately by contacting the District Manager.

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2. A second assistant manager, as the title suggests, is two levels below the Store Manager.

3. Clark, in the investigation, stated that the Store Manager was "not like that, he is a real nice person."

The District Court awarded summary judgment in favor of Publix, finding that "[a]rmed with the knowledge contained in the policy manual, which they chose not to follow, plaintiffs unreasonably failed to take advantage of preventative or corrective opportunities provided by Publix." *Madray v. Publix Super Markets, Inc.*, 30 F. Supp. 2d 1371, 1376 (S.D. Fla. 1998). A unanimous Eleventh Circuit affirmed, finding that Publix promulgated an effective sexual harassment policy, that petitioners acted unreasonably in delaying their use of the complaint procedures, and, upon effective notice, Publix responded promptly to correct the alleged harassment. *Madray v. Publix Super Markets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000).

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ENTERED A DECISION THAT DOES NOT CONFLICT WITH THE CITED DECISIONS OF TWO OTHER COURTS OF APPEAL, PARTICULARLY WHEN THE FACTUAL SITUATIONS OF THE CASES ARE FAIRLY ACCOUNTED FOR.

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998), this Court recognized that to "avoid this particular temptation to litigate," an affirmative defense to sexual harassment claims is available where the employee failed to act with reasonable care and to use a complaint procedure provided by the employer. This defense was found to be consistent with the statutory policy of Title VII to give credit

to employers who make reasonable efforts to prevent violations. In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998), this Court further noted that such a defense is appropriate because:

> [T]itle VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context.

Thus, this Court in *Faragher* and *Ellerth* concluded that where the evidence showed "an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden." *Id.* at 765; *Faragher*, 524 U.S. at 807.

The petition here seeks what this Court decided to avoid by recognizing the defense. While this Court sought to effect "Congress' intention to promote conciliation rather than litigation," the petition here seeks to promote litigation where an employee has, but does not use, a known, accessible, and effective complaint procedure that works immediately upon use. While this Court sought to recognize Title VII's design "to encourage the creation of antiharassment policies and effective grievance systems," this petition seeks to have such grievance systems ignored and to award damages to employees for doing so. And while this Court found that the unreasonable failure to use the complaint procedure would "normally suffice" in establishing the defense, this petition seeks a norm of continued litigation for damages, even where the Petitioners unreasonably

failed to use a known and accessible procedure which was immediately effective.[4]

The Petitioners' assertion that the decision below conflicts with the decision of the Third Circuit in *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999), and the Fifth Circuit in *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998), is incorrect. This is a case of two plaintiffs who unreasonably delayed in using a known, accessible, and fully effective procedure to complain about sexual harassment, while *Williamson* and *Hurley* are cases where the plaintiff repeatedly followed the procedure, but to no avail whatsoever.

In *Williamson*, the plaintiff, a female police officer, was repeatedly sexually harassed by a male officer for about eighteen months. *Williamson*, 174 F.3d at 464. The plaintiff repeatedly complained to her supervisor, a sergeant, in the squad room and in his office. *Id.* The city's sexual harassment policy provided that the employee "should report the alleged act immediately to his/her supervisor." *Id.* at 467. Her sergeant-supervisor had "authority to address the harassment problem," was the plaintiff's supervisor "in an organization with a strong chain of command," "could have directed [the subordinate perpetrator] to cease his harassing behaviors" and could have subjected the subordinate

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4. Contrary to Petitioners' argument, victims of hostile work environment harassment are not worse off under *Madray* than before the Court decided *Faragher* (Petition at 10). In fact, the decision below helps eliminate confusion by encouraging employers to develop and promulgate anti-harassment policies and complaint procedures that identify who should receive complaints. Indeed, there was no confusion here — Petitioners knew to complain to the District Manager and when they did he stopped the harassment.

perpetrator to discipline for failure to obey. *Id.* However, the sergeant was "wholly unresponsive" to the plaintiff's complaints, other than to arrange a temporary (two months) work reassignment during which the harassment continued when the plaintiff was in the squad room. *Id.* at 464. Finally, when the sergeant reassigned the plaintiff to work with the perpetrator, she complained to internal affairs and was then transferred out of the division. *Id.*

The defendant, City of Houston, attempted to claim (1) that it did not have notice of the sexual harassment until the internal affairs complaint, and (2) that the sergeant's knowledge could not be imputed to the city. *Id.* The court recognized that there was much evidence of the sergeant's awareness of the harassment and that the sergeant had authority to stop his subordinate. *Id.* Upon review of the sexual harassment policy and its express direction to the plaintiff to report harassment to her supervisor (the sergeant), the court stated:

> When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to accept notice of harassment problems.

Id.

Petitioners attempt to suggest that *Williamson* "rejected" an argument by the city which would have required reporting by the aggrieved employee beyond any low level supervisor. That is not the case. The *Williamson* decision rejected an argument requiring reporting beyond the **designated** supervisor stating:

> If the employer has structured its organization such that a given individual has the authority to accept

> notice of a sexual harassment problem, then notice to that individual is sufficient to hold the employer liable.

Id.

Clearly, the holding in *Williamson* is in complete accord with the decision here and not in conflict in any material way. The Eleventh Circuit held here that (1) Publix reasonably provided in its policy alternative avenues for lodging a complaint, (2) although the policy's only designated representative in the Petitioners' store was the Store Manager (who was the alleged perpetrator), the other designated representatives were readily accessible and there were also multiple avenues for lodging complaints outside the chain-of-command, so that (3) in conclusion, Publix cannot be charged with notice of harassment via informal complaints to subordinate managers in the store "**not designated** to receive complaints of sexual harassment under Publix's anti-harassment policy." *Madray*, 208 F.3d at 1302.

In *Hurley*, the Third Circuit was faced with another case involving harassment of a female police officer by co-workers. Notably, her immediate supervisor, a captain, "was responsible for preventing and redressing the harassment, pursuant to the ACPD's own policy." *Hurley*, 174 F.3d at 118. Although the co-workers' harassment of the plaintiff was extensive including "egregious examples of . . . offensive material, of appalling low character," and her supervisor was personally aware of the harassment and of her complaints, her supervisor (the captain), took no action against it, instead offering several offensive observations of his own. *Id.* at 104. The court thus found, unlike here, that

the policies were not enforced and that the department "failed to make a colorable case that its policies met the *Ellerth/ Faragher* standards." *Id.* at 118. Moreover, when the department attempted to argue that the plaintiff should have gone beyond its policy designation which placed responsibility on the supervisor (captain) and complained through the union grievance system, to the affirmative action officer, or to the chief, the court found that there was also extensive evidence about the ineffectiveness of those procedures. *Id.* at 105.

Again, the decision in *Hurley* is fully in accord with the holding here. As in *Williamson*, the plaintiff in *Hurley* contacted the person designated in the sexual harassment policy with responsibility to receive the complaint and address the harassment. As in *Williamson*, and as held here, that designation carries with it the responsibility of taking appropriate action on the complaint. However, in *Hurley*, as in *Williamson*, the designated supervisor failed to act upon the complaint, while here the designated person immediately took appropriate corrective action. Fairly considering and accounting for these differences in the facts, there clearly is no conflict in the decisions. Instead, the Third, Fifth and Eleventh Circuits all are in full agreement as to the importance of the plaintiff contacting the designated person in the policy because the designation (in the words of the Fifth Circuit) "sends a clear signal that those persons have the authority to accept notice of harassment problems." *Williamson*, 148 F.3d at 466.

II.

THE UNITED STATES COURT OF APPEALS HAS AFFIRMED A FINDING OF AN UNREASONABLE FAILURE BY PLAINTIFFS TO USE A KNOWN, EFFECTIVE COMPLAINT PROCEDURE WHICH THIS COURT HAS TWICE HELD "WILL NORMALLY SUFFICE" AS A COMPLETE AFFIRMATIVE DEFENSE TO THEIR CLAIMS.

In both *Faragher* and *Ellerth*, this Court held that "any unreasonable failure to use any complaint procedure provided by the employer" will "normally suffice" to establish a complete defense to plaintiffs' claims. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Although that is clearly what occurred here, Petitioners nevertheless seek damages for their failure to use the complaint procedure by continuing in their argument to ignore the complaint procedure's designation of persons to receive complaints and suggesting that the Court of Appeals' holding was instead that "only complaints to 'higher management' are sufficient" (Petition at 15). That is not the case.

Petitioners cite to *Faragher* and make an unwarranted argument that this case involves an important question not reached there of whether the employer knew of harassment vicariously through the knowledge of supervisors. The issue the Court did reach in *Faragher* was that the employer (unlike here) had no "serious prospect" of presenting the affirmative defense of an unreasonable failure to use the complaint procedure. That was because (unlike here), that employer "entirely failed to disseminate its policy against sexual harassment," failed to provide that "harassing supervisors could be bypassed in registering complaints," and "made no

attempt to keep track of the conduct of supervisors." *Id.* at 808. The point of *Faragher* is that there is an "affirmative defense" consisting of two elements: (1) "proof that [the] employer promulgated an anti-harassment policy with a complaint procedure" which was "suitable to the employment circumstances" and (2) proof that the plaintiffs (as here) unreasonably failed to use a complaint procedure. *Id.* at 807. Both elements were proved here and the result was an "affirmative defense" to Petitioners' claims.

Rather than being a case of a refusal to impute to a corporation knowledge of a sexually hostile environment by lower level supervisors, the Court of Appeals held here that given the existence of "an effective sexual harassment policy with appropriate complaint procedures," the employer would not be charged with notice via informal and limited complaints to lower level supervisors "**who were not designated to receive complaints**"[5] under the policy. *Madray*, 208 F.3d at 1302. This is an application of the affirmative defense already established in *Faragher* and *Ellerth* raising no important, unanswered questions.

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5. Petitioners' references to the District Manager being upset about not being told about another female employee's complaint about an attempted spanking and to the bakery manager's (Neff) statement that he would complain if the conduct continued do not create notice to the corporation of an alleged sexually hostile environment regarding Petitioners. Rather, they show the desire of management to effectively prevent any objectionable conduct.

CONCLUSION

The decision entered by the Eleventh Circuit is in accord with this Court's holdings in *Faragher* and *Ellerth* and does not present any conflict with decisions entered by the Third and Fifth Circuits. Thus, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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